

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

JAMES GARDIN,

Case No. C09-5116RJB

Plaintiff,

## REPORT AND RECOMMENDATION

V.

**NOTED FOR:**  
February 12, 2010

## CORRECTIONAL OFFICER MAHN,

Defendant.

This Civil Rights Action filed pursuant to 42 U.S.C. § 1983 has been referred to the undersigned Magistrate Judge pursuant to Title 28 U.S.C. §§ 636(b)(1)(A) and 636(b)(1)(B) and Local Magistrates' Rules MJR 1, MJR 3, and MJR 4. The matter is before the court upon defendant's motion to dismiss (Doc. 15).

## FACTUAL AND PROCEDURAL BACKGROUND

On March 2, 2009, plaintiff, James Gardin, submitted to the clerk of the court a complaint along with an application to proceed in forma pauperis. Doc. 1. The court subsequently reviewed the matter, granting plaintiff leave to proceed without paying the filing

1 fee and directed the clerk to forward the necessary documentation to the U.S. Marshal for  
2 service. Doc. 5. The Complaint, filed by the clerk on April 28, 2009, alleges plaintiff, while an  
3 inmate at the Kitsap County Jail was injured by Correctional Officer Mahn's use of excessive  
4 force and wrongfully denied medical assistance. Doc. 6.

5 On September 9, 2009, the undersigned reviewed the matter, noting that an Answer had  
6 not yet been filed. Plaintiff was ordered to show cause why his claims should not be dismissed  
7 for lack of prosecution. Doc. 8. In response, plaintiff filed a motion for appointment of counsel,  
8 Doc. 9, and a pleading that erroneously stated he did not initially submit the proper documents  
9 for service.<sup>1</sup> After considering plaintiff's explanation, the court directed defendant to file an  
10 answer or other appropriate pleading in response to the summons and complaint. Doc. 12.

12 On November 23, 2009, defendant filed the instant motion to dismiss. Doc. 15.  
13 Defendant asks the court to dismiss the matter based on the argument that the complaint and  
14 summons has not been properly served. The motion should be denied.  
15

#### DISCUSSION

17 In cases involving plaintiffs proceeding in forma pauperis, the U.S. Marshal, upon order  
18 of the court, is authorized to serve the summons and complaint. See 28 U.S.C. § 1915(c);  
19 Boudette v. Blandford, 923 F.2d 754, 757 (9th Cir.1991). An incarcerated pro se plaintiff  
20 proceeding in forma pauperis is entitled to rely on the marshal for service of the summons and  
21 complaint and should not be penalized by having his action dismissed for failure to effect service  
22 where the marshal or the court clerk has failed to perform his duties. Puett v. Blandford, 912  
23

24  
25  
26 <sup>1</sup> When the Complaint was submitted, plaintiff provided all the necessary documents for service. Otherwise, the  
clerk would not have been able to put the service package together for the U.S. Marshal and the court would have  
issued an order addressing the deficiency.

1 F.2d 270, 275 (9<sup>th</sup> Cir. 1989). Nevertheless, the plaintiff who relies on the marshal for service  
2 must provide the necessary information and documents to help effect service. Id.

3 Defendant states that “no document has been delivered by the United States Marshall,  
4 regarding the above action, to either Officer Mahn, or his counsel.” Doc. 15 at 1-2. In contrast  
5 with this statement, the record indicates the U.S. Marshall sent the service documents to Officer  
6 Mahn at the Kitsap County Jail on May 27, 2009. Doc. 20. As of January 8, 2010, the U.S.  
7 Marshall has not received an acknowledgement of receipt. Id.

8 As stated above, the plaintiff properly supplied the necessary forms and documents to  
9 effect service and he should not be penalized by having his claims and causes of action dismissed  
10 for lack of service completed by the U.S. Marshal. At this point, the Court should deny the  
11 motion to dismiss. Because defendants claim that they have not received the service of  
12 summons, this court recommends that the matter be served again by either the U.S. Marshal or  
13 directly by the Clerk of the court.  
14

### CONCLUSION

15 Defendants’ motion to dismiss should be DENIED. Pursuant to 28 U.S.C. § 636(b)(1)  
16 and Rule 72(b) of the Fed. R. Civ. P., the parties shall have fourteen (14) days from service of  
17 this Report to file written objections. See also Fed. R. Civ. P. 6. Failure to file objections will  
18 result in a waiver of those objections for purposes of appeal. Thomas v. Arn, 474 U.S. 140  
19 (1985). Accommodating the time limit imposed by Rule 72(b), the clerk is directed to set the  
20 matter for consideration on February 12, 2010, as noted in the caption.  
21

22 Dated this 20<sup>th</sup> day of January, 2010.  
23

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26

J. Richard Creatura  
United States Magistrate Judge